(1)
SUPREME COURT, U.S.
FILED
No. 06-1181 FEB 26 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

ALBERTO GONZALES,
United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RAED GONZALEZ
Counsel of Record for Petitioner
QUAN, BURDETTE & PEREZ, P.C.
5177 Richmond Ave., Suite 800
Houston, Texas 77056
(713) 625-9225

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was rendered statutorily ineligible for adjustment of status to lawful permanent resident because he did not depart the United States voluntarily pursuant an order of the Board of Immigration Appeals ("BIA"), despite the fact that Petitioner had timely withdrawn his request for voluntary departure.

2. Alternatively, whether the period of voluntary departure granted by the BIA was tolled by the timely filing of Petitioner's Motion to Reopen and Reconsider his removal to seek relief in the form of adjustment of status.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Citations to the Opinions and Orders Below	1
Statement of Jurisdiction	1
Applicable Law	2
Statement of the Case	6
A. Jurisdiction of the Court of Appeals	8
B. Facts	8
C. Procedural History	10
1. Before the Immigration Judge	10
2. Administrative Appeal	11
3. Judicial Review	11
Argument for Allowing the Writ	13
A. The Voluntary Departure Issue upon Reopening	15
B. The "Tolling Issue"	18
1. The Circuit Split	18
2. The Effect of the Fifth Circuit Position	21
Conclusion	23

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES COURTS OF APPEALS

Azarte v. Ashcroft, 394 F.3d 1278 (9th Cir. 2005) 12, 18, 19, 21

Banda-Ortiz v. Gonzales, 445 F.3d 387 (5th Cir. 2006) 12, 13, 17, 20

Kanivets v. Gonzales, 424 F.3d 330 (3rd Cir. 2005) 12, 19, 20, 21

Orichitch v. Gonzales, 421 F.3d 595 (7th Cir. 2005) 16

Sidikhouya v. Gonzales, 407 F.3d 950 (8th Cir. 2005) 12, 19

Ugokwe v. U.S. Attorney General, 453 F.3d 1325 (11th Cir. 2006) 12, 20

AGENCY DECISIONS

Matter of Arguelles, 22 I&N Dec. 811 (BIA 1999) 17

Matter of Chouliaris, 16 I&N Dec. 169 (BIA 1977) 14

Matter of Shaar, 21 I&N Dec. 329 (BIA 1996) 10

Matter of Velarde, 23 I&N Dec. 253 (BIA 2002) .. 7, 10, 11, 13

STATUTES

8 U.S.C. §1227(a)(2)(A)(iii) 3

8 U.S.C. §1229a(c)(7) 18, 22

8 U.S.C. §1229a(c)(7)(A) 2, 17

8 U.S.C. §1229a(c)(7)(C) 17

8 U.S.C. §1229a(c)(7)(C)(i) 2, 17

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. §1229c 13

8 U.S.C. §1229c(b)(1) 3

8 U.S.C. §1229c(b)(2) 3, 14, 21

8 U.S.C. §1229c(d) 18, 19

8 U.S.C. §1229c(d)(1) 3, 16

8 U.S.C. §1252(a)(1) 8

8 U.S.C. §1252(a)(2)(B) 1

8 U.S.C. §1252(a)(2)(D) 2

8 U.S.C. §1255 ..... *passim*

28 U.S.C. §1254(1) 1

REGULATIONS

8 C.F.R. §1003.2 ..... 13, 18

8 C.F.R. §1003.2(c)(1) 4

8 C.F.R. §1003.2(c)(2) 5

8 C.F.R. §1003.2(d) 5, 14

8 C.F.R. §1240.26(f) 5, 21

8 C.F.R. §1245.2(a)(1)(i) 4

CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review is unreported. *Dada v. Gonzales,* No. 06-60180 (5th Cir. November 28, 2006). App. 1.

The decision of the Board of Immigration Appeals denying respondent's Motion to Reopen and Reconsider affirming the Immigration Judge denying Petitioner's application for adjustment of status to lawful permanent resident pursuant to §245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1255, is unreported. *Matter of Dada,* File A78 129 270 (BIA, February 8, 2006). App. 3.

The decision of the Board of Immigration Appeals affirming without opinion the decision of the Immigration Judge is unreported. *Matter of Dada,* File A78 129 270 (BIA, November 4, 2005). App. 5.

The decision of the Immigration Judge, denying Petitioner an opportunity to apply for adjustment of status is unreported. *Matter of Dada,* File A78 129 270 United States Immigration Court, Houston, Texas, September 8, 2004). App. 6.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on November 28, 2006. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. §1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. §1252(a)(2)(B)

because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D).

APPLICABLE LAW

INA §245(a), 8 U.S.C. §1255(a), which provides:

> Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

INA §240(c)(7)(A), 8 U.S.C. §1229a(c)(7)(A), which provides: "In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)."

INA §240(c)(7)(C)(i), 8 U.S.C. §1229a(c)(7)(C)(i), which provides: "In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."

INA §240B(b)(1), 8 U.S.C. §1229c(b)(1), which provides:

> In general. The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240 [8 U.S.C. §1229a], the immigration judge enters an order granting voluntary departure in lieu of removal and finds that – (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a) [8 U.S.C. §1229(a)]; (B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure; (C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4) [8 U.S.C. §1227(a)(2)(A)(iii) or §1227(a)(4)]; and (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

INA §240B(b)(2), 8 U.S.C. §1229c(b)(2), which provides: "Period. Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days."

INA §240B(d)(1), 8 U.S.C. §1229c(d)(1), which provides:

> In general. Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien – (A) shall be subject to a civil penalty of not less than $ 1,000 and not more than $ 5,000; and (B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 240A, 245, 248, and 249.

8 C.F.R. §1245.2(a)(1)(i), which provides: "In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."

8 C.F.R. §1003.2(c)(1), which provides:

> A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in §1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the

entry of the administratively final order of deportation.

8 C.F.R. §1003.2(c)(2), which provides:

Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

8 C.F.R. §1003.2(d), which provides:

Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. §1240.26(f), which provides:

Extension of time to depart. Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board

is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act.

STATEMENT OF THE CASE

This case involves the contradictory interplay between two sections of the Immigration and Nationality Act ("INA"), one permitting a motion to reopen and/or reconsider a decision in removal proceedings to seek relief from removal if filed within ninety days of a final removal order, and another section of the Act that bars certain relief applications for ten years when the alien fails to timely depart the United States after having been granted the privilege of voluntary departure. Specifically, the issue is whether the timely filing of a motion to reopen (when voluntary departure was granted in the underlying proceeding) *tolls* the voluntary departure order while the motion is being considered, or, as will be discussed herein, the alien loses all rights to underlying relief by not voluntarily departing if the appeal adjudicatory period lasts longer than the period of voluntary departure.

Petitioner Samson T. Dada appealed a decision from the Immigration Judge denying him an opportunity to apply for adjustment of status under Section 245 of the

INA, 8 U.S.C. §1255 pursuant to *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).[1] The BIA dismissed his appeal through an affirmance without opinion and reinstated the voluntary departure order of the Immigration Judge. Prior to the expiration of his voluntary departure period, Petitioner filed a Motion to Reopen and Reconsider with the Board under *Matter of Velarde*, and timely withdrew his request for voluntary departure. This Motion was denied for failure to voluntarily depart, thereby making Petitioner ineligible for adjustment of status. The Court of Appeals held that the Petitioner failed to show that the BIA abused its discretion in denying the Motion to Reopen and Reconsider, and, accordingly, denied the Petition for Review.

The majority of United States Courts of Appeals that have considered the issue have held that the timely filing of a motion to reopen before the expiration of a voluntary departure period tolls the voluntary departure while the motion is under consideration, such that the relief application underlying the motion to reopen remains viable. The Fifth Circuit's decision in Petitioner's case therefore creates a split between the Circuits with respect to the questions presented, with the Fifth Circuit standing alone in its interpretation of the applicable statutes and regulations. It should also be noted that a petition for a writ of certiorari dealing with substantially similar issues is currently pending before this Honorable Court. *See Jamal Moorani v. Alberto R. Gonzalez*, No. 06-610 (2006).

---

[1] The Immigration Judge's decision denying respondent an opportunity to apply for adjustment of status is most troubling. Contrary to established precedent, the Immigration Judge denied Petitioner an opportunity to apply for adjustment of status under Section 245(a) of the Act because of the length of time in processing the visa petitions, which is entirely beyond the control of the petitioner.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts

The Petitioner, Mr. Samson T. Dada, is a native and citizen of Nigeria who first entered the United States on or about April 10, 1998 as a non-immigrant with a P-3 classification[2] with an authorized period of stay in the U.S. until August 31, 1998. Subsequent to his admission, Petitioner married a United States citizen. It should be noted that the Petitioner has attempted to comply with the immigration laws in every way. He is not a criminal nor has he committed fraud. He is married to a U.S. citizen, and is the beneficiary of an immediate relative visa petition. None of these important underlying facts are disputed in these proceedings.

Petitioner's wife filed an immediate relative visa petition on his behalf to allow him to become a legal permanent resident of the United States. Concurrently with this visa petition, Petitioner filed an application for adjustment of status under Section 245(a) of the INA. Specifically, Section 245(a) of the Act provides for the adjustment of status of an alien who was inspected, admitted, or paroled into the United States, regardless of overstay, if the alien:

---

[2] A P-3 visa classification is accorded to artists or entertainers coming to the U.S. to perform.

1. . . . [m]akes an application for such adjustment;

2. the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

3. an immigrant visa is immediately available to him at the time his application is filed. INA Section 245(a); 8 U.S.C. §1255(a).

Petitioner satisfies all of these requirements. Nevertheless, he failed to respond to a request for additional evidence from the Government and his visa petition was denied.

On January 4, 2004 the Government issued a Notice to Appear ("NTA") charging the Petitioner with being removable. In the interim, Petitioner's wife filed a new visa petition on his behalf. At the underlying removal hearings, Petitioner sought relief in the form of adjustment of status in court as the beneficiary of the newly filed immediate relative petition filed by his U.S. citizen wife. *See* App. 7. As the visa petition remained pending at the time he was placed in proceedings, Petitioner sought a continuance to allow for the visa petition to be approved. *Id.* However, contrary to established precedent, the Immigration Judge denied Petitioner a continuance while awaiting the adjudication of his visa petition simply because "it would take too long." *Id.*

Inexplicably, the Board of Immigration Appeals affirmed the decision without opinion. *See* App. 5. After a Motion to Reopen and Reconsider and withdrawal of request for voluntary departure was filed, the Board found that at that point the Petitioner was ineligible to adjust because he did not depart the United States per the

voluntary departure grant, did not allow respondent to withdraw his voluntary departure, and asserted that Petitioner was barred for adjustment of status for ten years under *Matter of Shaar*, 21 I&N Dec. 3290 (BIA 1996). *See* App. 3. Petitioner's attempt to reopen his removal proceedings to enable consideration of his adjustment of status forms the basis of the controversy herein, as the primary issue in dispute is whether the grant of voluntary departure while such a reopening was pending should have been tolled.

C. Procedural History

The instant removal proceedings were commenced by the filing of a Notice to Appear, dated January 4, 2004. The NTA was issued by the INS Interim District Director, following Petitioner's denial of his initial immediate relative visa petition and adjustment of status applications. The allegations and charge of removability under the NTA are not at issue or the subject of the instant petition.

(1) Before the Immigration Judge

At a master calendar hearing, the Petitioner pleaded to the allegations and charge on the NTA through counsel. On the subject of relief, Mr. Dada indicated through counsel that he would be seeking adjustment of status under Section 245(a) of the Act. Mr. Dada's immediate relative visa petition remained pending at the time of the hearing. Accordingly, he requested a continuance to allow for the adjudication of the visa petition, as permitted under *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002). Deviating from established precedents, the Immigration

Judge denied a continuance simply because she believed the adjudication of the visa petition would be too lengthy. App. 7.

(2) Administrative Appeal

Petitioner appealed to the BIA complaining initially about the denial of a continuance under *Matter of Velarde*, *supra*, to allow him to pursue adjustment of status. The Board of Immigration Appeals dismissed his appeal and reinstated a period of voluntary departure. App. 5. Prior to the expiration of his voluntary departure period, the Petitioner filed a Motion to Reopen and Reconsider the dismissal on his case arguing eligibility under *Velarde, supra*. App. 3. In that Motion, Petitioner also timely withdrew his request for voluntary departure. Further, with his motion, Petitioner filed proof of his eligibility to adjust his status under *Matter of Velarde*, *supra*. Without articulating their rationale for deviating from their own precedent, the Board of Immigration Appeals denied Petitioner's Motion to Reopen and Reconsider, and found that since the Petitioner failed to depart pursuant to the voluntary departure as it had been originally reinstated by the Board of Immigration Appeals, he was barred from adjustment of status for ten years. App. 3. A timely petition for review with the Fifth Circuit Court of Appeals followed. App. 1.

(3) Judicial Review

Before the Fifth Circuit Court of Appeals, Petitioner urged that the BIA erred in not reopening his case to allow him to pursue adjustment of status. Petitioner properly raised the argument that the timely filing of his motion to

reopen before the expiration of the thirty-day voluntary departure period operated to toll the voluntary departure while the motion was under consideration. In support of this argument, Petitioner cited decisions from both the Ninth and Eighth Circuit Courts of Appeals. *See Azarte v. Ashcroft,* 394 F.3d 1278 (9th Cir. 2005); *Sidikhouya v. Gonzales,* 407 F.3d 950 (8th Cir. 2005). Subsequent to the briefing of this appeal, the Third Circuit Court of Appeals also ruled that the voluntary departure period was tolled by a timely motion to reopen in its decision in *Kanivets v. Gonzales,* 424 F.3d 330 (3rd Cir. 2005).

The Fifth Circuit ruled that the timely filing of the Motion to Reopen and Reconsider did not toll the expiration of the voluntary departure order, and that the alien's failure to depart therefore rendered him ineligible for the requested relief for ten years. *See* App. 1-2. It should be noted that strong dissenting opinion was filed in *Banda-Ortiz v. Gonzales,* 445 F.3d 387 (5th Cir. 2006), the case cited by the Fifth Circuit in denying the underlying petition for review. The dissent in *Banda-Ortiz* reasoned that the Fifth Circuit should have followed the decisions and rationale of the Ninth, Eighth and Third Circuits. *See Banda-Ortiz v. Gonzales,* 445 F.3d 387, 391 (5th Cir. 2006). In ultimately denying Mr. Dada's petition for review, the Fifth Circuit failed to address the effect of Mr. Dada's timely withdrawal of his request for voluntary departure. *See* App. 1-2.

Subsequent to the decision by the Fifth Circuit Court of Appeals in this case, the Eleventh Circuit joined the Ninth, Eighth and Third Circuits' holdings regarding voluntary departure "tolling" issue. *Ugokwe v. U.S. Attorney General,* 453 F.3d 1325 (11th Cir. 2006). In so doing, the Eleventh Circuit discussed and specifically rejected

the Fifth Circuit position announced by the *Banda-Ortiz* majority. *Id.* at 1330.

In light of the four-to-one Circuit split, as well as the extremely strong dissenting opinion in the one outlying decision (*Banda-Ortiz*) and the fact that the facts of Petitioner's case were not addressed in that decision, Petitioner timely files the instant petition for writ of certiorari.

ARGUMENT FOR ALLOWING THE WRIT

The decision of the Court of Appeals in this case is ill-considered and contrary to the holdings of all other Circuits that have considered these issues. This Court's intervention is therefore necessary to insure uniformity in the application of the law.

The procedural circumstances of this case are not unusual. An alien seeks relief from removal, in this case by an application for adjustment of status before the court. Under *Matter of Velarde, supra*, an alien is entitled to a continuance while his immediate relative visa petition remains pending. The statute and regulations allow the Attorney General to reopen proceedings to seek newly available relief, setting forth time limits and other procedural requirements that were met in this case. 8 C.F.R. §1003.2.

However, the process of reopening becomes infinitely more complicated, if not impossible, if the alien is granted voluntary departure under INA §240B. 8 U.S.C. §1229c. Once a motion to reopen is filed, *any* departure from the United States by the alien operates to withdraw the

motion. 8 C.F.R. §1003.2(d). Voluntary departure is limited to no more than sixty days at the conclusion of removal proceedings. 8 U.S.C. §1229c(b)(2). In dismissing an appeal, the BIA routinely extends that voluntary departure for an additional thirty days.[3] *Matter of Chouliaris,* 16 I&N Dec. 169 (BIA 1977). Motions to reopen, however, routinely take much longer than the period of voluntary departure to be decided. An alien granted voluntary departure is thus confronted with the dilemma when relief becomes available of either filing a motion to reopen and awaiting a decision or departing the U.S. (in compliance with the voluntary departure order) and, in so doing, abandoning any relief.

The decision below restricts not only the rights of aliens who seek to reopen removal proceedings for available or newly available relief, but the power and discretion of the Attorney General to consider and grant such motions. By holding that the Attorney General loses jurisdiction to reopen removal proceedings upon the expiration of a brief period of voluntary departure, the Fifth Circuit's position effectively erases both the statute and regulation that allow reopening of removal proceedings for consideration of new relief. Further, because this extreme consequence befalls only aliens granted the "privilege" of voluntary departure, wary aliens and their counsel will no

[3] The BIA's practice of automatically extending voluntary departure for a period of thirty days following an unsuccessful appeal by the alien has existed for almost thirty years and continues to this day. Whether such practice is still proper in light of the sixty-day limit imposed by statute and regulation remains an open question. Moreover, the Petitioner timely withdrew his request for voluntary departure. His request was denied by the BIA, and was not considered at all in the decision from the Fifth Circuit.

longer dare to apply for voluntary departure, and an important tool provided in the Immigration and Nationality Act for efficient administration of the immigration laws will become useless. The Fifth Circuit's decision in this case thus has implications and consequences far beyond the individual suffering of Mr. Dada.

There are three reasons the decision below should be vacated. First, as urged to the Immigration Judge, the BIA and the Court of Appeals, the Immigration Judge's decision denying Petitioner an opportunity to apply for adjustment of status under Section 245(a) of the Act was contrary to established precedent and thus violative of Petitioner's due process rights. Second, the timely withdrawal of his request for voluntary departure eliminated the order of voluntary departure such that Mr. Dada no longer had a period in which to depart. Alternatively, if that voluntary departure period somehow survived the withdrawal, such a period should have been tolled by the timely filing of the motion to reopen and reconsider. Finally, the decision should be vacated because, in holding that the BIA lacked jurisdiction to reopen after the expiration of the voluntary departure period, the Court of Appeals affirmed the denial of relief to Mr. Dada on grounds never articulated by the Immigration Judge or the BIA.

A. The Voluntary Departure issue upon reopening

Petitioner raised the argument to both the Board and the Fifth Circuit that the voluntary departure order with which he allegedly failed to comply no longer existed after the Petitioner withdrew his request for voluntary departure. This issue of whether failure to comply with a voluntary departure order bars relief, even when a motion to

reopen was filed during the voluntary departure period and remained pending afterwards, was specifically addressed in an on-point Seventh Circuit decision, *Orichitch v. Gonzales,* 421 F.3d 595 (7th Cir. 2005).

In *Orichitch*, the Seventh Circuit Court of Appeals *expressly* held that the bar to relief provided in INA §240B(d) – the statute expressly relied upon in the denial or Mr. Dada's application – no longer applies if the voluntary departure order has been reopened.

> There is no dispute that Orichitch did not depart within the specified period for her voluntary departure, or that she was warned in the order of the consequences for failing to do so. What remains at issue is whether *Section 240B(d)* continues to operate in this case.
>
> It does not. The BIA, by granting Orichitch's motion to reopen on February 12, 2001, permanently disposed of the existing *Section 240B(d)* issue. More precisely, the grant of the motion to reopen disposed of the *Section 240B(d)* issue by disposing of the order that otherwise triggered the operative effect of that section – the February 10, 1999, voluntary departure order.

Orichitch, 421 F.3d at 597-98. As will be discussed further herein, the holding of the Fifth Circuit is in direct contravention with the authority of multiple other Circuits.

Furthermore, there is no authority of which Petitioner is aware that supports the BIA position in this case that INA §240B(d) deprives the Board of "jurisdiction" over considering the merits of a timely filed motion. 8 U.S.C. §1229c(d). The cited statute says nothing about limiting the Attorney General's authority to reopen removal proceedings. Moreover, Congress specified elsewhere in the

Act that aliens shall have the opportunity to file a motion to reopen within ninety days of the final removal order. INA §240(c)(7)(A), (C)(i); 8 U.S.C. §1229a(c)(7)(A), (C)(i). By holding that a failure to depart after the filing of a timely motion deprives the Board of jurisdiction over the motion, the decision below (and in *Banda-Ortiz* to the extent it implies such a holding) effectively overrides the ninety-day *statutory* time limit for filing a motion to reopen. INA §240(c)(7)(C), 8 U.S.C. §1229a(c)(7)(C).

Thus, by the rationale of the Fifth Circuit in *Banda-Ortiz* and the underlying case, a motion to reopen would have to be filed *and decided* within the thirty-day voluntary departure period generally granted by the Board. It implies that the Attorney General does not even have the *discretion* to reopen once the thirty-day voluntary departure period expires, despite the filing of a timely and meritorious motion. Rather, *Banda-Ortiz* essentially commands that the Board make its decision before the voluntary departure period expires – sometimes a matter of mere days after the motion is filed – in every case, or lose the ability to order the case reopened.

It also cannot be overemphasized that all of these consequences *only* apply to aliens granted the so-called *privilege* of voluntary departure. An alien ordered deported or removed in the first instance would be unaffected by these constraints. If *Banda-Ortiz* and the decision in this case are left to endure, then no alien with the slightest possibility of future relief should *ever* agree to voluntary departure, and an important "tool" provided by Congress to allow Immigration Judges "to quickly and efficiently dispose of numerous cases on their docket" thereby loses much of its intended effect. *Matter of Arguelles,* 22 I&N Dec. 811 (BIA 1999).

B. The "Tolling Issue"

As noted above, the procedural setting of this case is not unique. Aliens with relief or newly available relief from removal frequently file timely motions to reopen in accordance with the statute and regulations permitting them so to do. 8 U.S.C. §1229a(c)(7), 8 C.F.R. §1003.2. The Courts of Appeals have therefore been confronted with the interplay of that statute and another raising a ten-year bar to relief for failure to depart during a voluntary departure period. 8 U.S.C. §1229c(d). Of course, in most of those cases, the failure to depart was asserted by the BIA as grounds for *denying* the motions to reopen rather than considering the merits of the individual cases. The approach adopted by multiple other Circuits of considering the voluntary departure period tolled after the filing of a timely motion to reopen presents an alternative reason for rejecting the decision below.

1. The Circuit Split

The Ninth Circuit Court of Appeals was the first to confront this dilemma. In *Azarte v. Ashcroft,* 394 F.3d 1278 (9th Cir. 2005), the Ninth Circuit held that the voluntary departure period is tolled with the filing of a motion to reopen. *Azarte v. Ashcroft,* 394 F.3d 1278 (9th Cir. 2005). The rationale for this holding was the need to construe the statute as a whole – "the statutory interpretation of the motion to reopen and voluntary departure provisions must be such that both provisions have force." *Id.* at 1288.

The Ninth Circuit noted that aliens have a statutory right to file a motion to reopen within the limits provided, that any departure would operate to withdraw the motion to reopen, that voluntary departure could not be extended beyond the maximum sixty days authorized by statute, and

that "the BIA rarely if ever rules on a motion to reopen before an alien's voluntary departure period has expired." *Id.* at 1281-82. By interpreting the ten year bar for failure to depart as barring relief even where a motion to reopen is timely filed, the BIA "deprives the motion to reopen provision of meaning by eliminating the availability of such motions to those granted voluntary departure." *Id.* at 1288. The Ninth Circuit, therefore, found it more consistent with the Immigration and Nationality Act as a whole to "toll the voluntary departure period when an alien, prior to the expiration of his voluntary departure period, files a timely motion to reopen." *Id.*

Other Circuits soon followed the Ninth. Four months after *Azarte*, the Eighth Circuit adopted the same rationale and holding in *Sidikhouya v. Gonzales,* 407 F.3d 950 (8th Cir. 2005). Later that same year, the Third Circuit also held that a motion to reopen filed before the expiration of the voluntary departure period must be adjudicated on its merits. *See Kanivets v. Gonzales,* 424 F.3d 330 (3rd Cir. 2005).

The facts in *Kanivets* are quite similar to those presented in the instant case. Specifically, an application was denied with a grant of sixty-days voluntary departure, the denial was affirmed by the BIA, and the voluntary departure was extended for an additional thirty days. *Id.* However, before the end of that period, a motion to reopen was filed seeking adjustment of status based upon an immigrant visa petition filed by a prospective employer. *Id.* In *Kanivets,* however, the Board denied reopening, asserting that the expiration of the voluntary departure period subsequent to the filing of the motion to reopen rendered the alien ineligible for adjustment of status under INA §240B(d). 8 U.S.C. §1229c(d). The Third Circuit, however,

held that such a motion filed before the expiration of the voluntary departure period must be adjudicated on the merits. *See Kanivets v. Gonzales,* 424 F.3d 330 (3rd Cir. 2005).

The Eleventh Circuit also has recently ruled that a timely motion to reopen, filed before the expiration of voluntary departure, operates to toll the voluntary departure period until the motion can be decided on its merits. *Ugokwe v. U.S. Attorney General,* 453 F.3d 1325 (11th Cir. 2006). After an analysis of the earlier precedential decisions from the Ninth, Eighth and Third Circuits, as well as the Fifth Circuit decision and the dissenting opinion in *Banda-Ortiz,* the Eleventh Circuit held:

> We are persuaded by the rationale of Judge Smith and the Third, Eighth, and Ninth Circuits. Because Ugokwe's case clearly involves both the voluntary departure and motion to reopen statutes, we cannot, as did the Fifth Circuit, exclusively focus on the voluntary departure standards and ignore the motion to reopen provisions.

Ugokwe v. U.S. Attorney General, 453 F.3d at 1330. Thus, had Mr. Dada's case arisen in any of the numerous states governed by the Third, Eighth, Ninth or Eleventh Circuits, the sole issue asserted for denying his application for lawful permanent resident status would never have barred relief or reopening. As Petitioner believes those Circuits to have correctly interpreted the interplay between the motion to reopen and the voluntary departure provisions of the Immigration and Nationality Act, intervention from this Court is urgently sought to resolve the Circuit split.

2. The Effect of the Fifth Circuit Position

The practical effect of the competing positions should be briefly discussed at this point. The majority position taken by the Third, Eighth, Ninth and Eleventh Circuits is both logical and reasonable to all parties involved. The position does not require the Attorney General to reopen all cases where newly available relief or new evidence is asserted. The Attorney General, through his Immigration Judges and the Board of Immigration Appeals, may still deny reopening on any number of procedural or substantive grounds, as well as in the exercise of discretion. By tolling the expiration of the voluntary departure period after the filing of a timely motion to reopen, the majority position simply removes the dilemma posed by competing statutory commands and requires the Attorney General to adjudicate the motions to reopen on their respective merits, without regard to the voluntary departure issue.

In the Fifth Circuit, by contrast, it will be virtually impossible for any removal case to be reopened where voluntary departure has been granted. As noted, voluntary departure is statutorily limited to sixty days after completion of removal proceedings, and cannot be extended beyond that limit. 8 U.S.C. §1229c(b)(2), 8 C.F.R. §1240.26(f). It took the BIA approximately 13 months to consider Mr. Dada's timely motion to reopen initially, and an additional four months to consider the subsequent motion to reopen and reconsider. Such adjudications rarely take less time, and frequently take more. In *Azarte,* the motion to reopen was denied approximately six months after it was filed. *See Azarte v. Ashcroft, supra,* at 1281. It took over eight months in *Kanivets. See Kanivets v. Gonzales, supra,* at 332-33. Since the brief period of voluntary departure allowed now is considered to govern the jurisdiction of

the Attorney General to reopen proceedings, it will be virtually impossible as a practical matter to reopen removal proceedings as authorized by statute. 8 U.S.C. §1229a(c)(7).

This effect becomes even more alarming when considered in conjunction with the first issue discussed above. While the majority of Circuits now require the Attorney General to adjudicate timely motions to reopen on their merits without regard to the voluntary departure issue, in the Fifth Circuit it is no longer possible to do so. By holding that the expiration of the voluntary departure period deprives the agency of "any further jurisdiction over" the case, the Fifth Circuit holds that the Attorney General *cannot* adjudicate timely filed motions to reopen on their merits unless the decision is made within the brief time allowed before the voluntary departure period expires. This rarely happens, and it is doubtful that such a swift adjudication within the voluntary departure period is even administratively possible.

For the reasons noted, the decision below raises two compelling issues. On the first and primary issue, the Fifth Circuit is opposed by two others by holding that the voluntary departure order somehow survives the decision reopening that order. On the second, the Fifth Circuit is opposed by four others in refusing to consider the voluntary departure period tolled. On both issues, the Fifth Circuit stands alone. Therefore, intervention by this Court to resolve these conflicts is urgently needed for the reasons stated and to ensure consistency, efficiency, and justice in the application of the nation's laws.

CONCLUSION

For the reasons shown, Petitioner urges that he is legally eligible to apply for adjustment of status to lawful permanent resident as the beneficiary of an immediate relative visa petition filed on his behalf, notwithstanding that a period of voluntary departure granted in an order later considered before his application could be considered. Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

QUAN BURDETTE & PEREZ, P.C.
RAED GONZALEZ
Counsel of Record for Petitioner
5177 Richmond Ave., Suite 800
Houston, TX 77056
(713) 625-9225

2006 WL 3420124

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60180
Summary Calendar

SAMSON TAIWO DADA,

Petitioner,

versus

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A78 129 270

(Filed Nov. 28, 2006)

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Samson Taiwo Dada is a citizen of Nigeria who was admitted into the United States in April 1998 and remained in the country beyond the authorized period. An

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

immigration judge (IJ) ordered Dada to be removed but granted his request for voluntary departure. The Board of Immigration Appeals (BIA) affirmed the IJ's decision. Dada filed a motion to reopen on the ground that he was seeking adjustment of status, and he sought leave to withdraw his request for voluntary departure. The BIA denied Dada's motion to reopen on the ground that, because he failed to leave the United States by the imposed deadline for voluntary departure, he was statutorily ineligible for adjustment of status, pursuant to 8 U.S.C. § 1229c(d).

In this petition for review, Dada argues that the BIA erred by (1) finding him to be statutorily ineligible for adjustment of status under § 1229c(d) and (2) denying his motion to reopen despite the IJ's denial of Dada's request for a continuance. The BIA's interpretation of the applicable statutes rendering Dada ineligible was reasonable. *See Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-91 (5th Cir. 2006). The IJ did not abuse its discretion by denying Dada's request for a continuance. *See Ahmed v. Gonzales*, 447 F.3d 433, 438-39 (5th Cir. 2006). Dada's arguments challenging the IJ's decision and the BIA's affirmance of that decision are not cognizable within his petition for review, which was directed at the BIA's denial of Dada's motion to reopen. *See Guevara v. Gonzales*, 450 F.3d 173, 176 (5th Cir. 2006).

Dada has failed to show that the BIA abused its discretion by denying his motion to reopen. *See Zhao v. Gonzales*, 404 F.3d 295, 303-04 (5th Cir. 2005). Accordingly, his petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78 129 270 – Houston Date: Feb. 8, 2006

In re: SAMSON TAIWO DADA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esq.

ORDER:

PER CURIAM. This case was last before us on November 4, 2005, when this Board dismissed the respondent's appeal from an Immigration Judge's decision denying a continuance pending the adjudication of a visa petition filed on the respondent's behalf by his United States citizen wife. The respondent has now submitted a motion to reopen and reconsider, also asking that he be permitted to withdraw his request for voluntary departure and be granted a stay of removal until his visa petition is adjudicated. He contends that the board's prior decision was in error, citing to our holdings in *Matter of Velarde*, 23 I&N Dec. 223 (BIA 2000) and *Matter of Isber*, 20 I&N Dec. 676 (BIA 1993) in support of his claim. He further maintains that he has submitted new and material evidence in the form of an application for adjustment of status and evidence regarding the bona fides of his marriage, such that reopening is warranted.

Pursuant to section 240B(d) of the Act, 8 U.S.C. § 1229c(d), an alien who fails to depart following a grant of voluntary departure, and who has been provided written

notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief. We find that the respondent is barred from applying for adjustment of status by section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). An alien who remains in the United States after the scheduled date of departure is statutorily ineligible for discretionary relief. We note that neither of the cases cited by the respondent provides an exception to this rule. Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is not statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-129-270 – Houston Date: NOV 4 2005

In re: DADA, SAMSON TAIWO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eheman, Michael W., Esq.

ON BEHALF OF DHS: Luis, Lisa, Assistant Chief Counsel

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall

be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File A 79 129 270 September 8, 2004

In the Matter of

SAMSON TAIWO DADA,) IN REMOVAL
Respondent) PROCEEDINGS
)

CHARGE: 237(a)(1)(B) of the Immigration and Nationality Act – remaining in the United States for a period longer than permitted.

APPLICATION: Continuance for the adjudication of an I-130[1]; and voluntary departure in the alternative.

ON BEHALF OF RESPONDENT: Michael Eheman, Esquire

ON BEHALF OF DHS: Lisa Louise, Esquire
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a native and citizen of Nigeria and he entered the United States on or around April the 10th 1998 as a non-immigrant P-3 with authorization to remain in the United States for a temporary period not to exceed August 31st 1998, however, he did remain beyond that period. Subsequently, on January the

[1] In the file is the Exhibit Number 2, a copy of the most recent I-130 filed by the petitioner, Tisha L. Williams.

4th 2004, the Government issued the charging document, charging the respondent with being removable from the United States for the reasons set forth above. The respondent was placed in removal proceedings and at the Master Calendar hearing, the initial master Calendar hearing, the Court granted the respondent's attorney a continuance for attorney preparation. That was May 13th. Four months later, the attorney for the respondent appeared and admitted the allegations in the charging document, conceded the charges, and requested that the Court grant a continuance so that the respondent could proceed with the I-130 which was filed on March 17th 2004 by his U.S. citizen wife. However, the Government opposed the request based upon the fact that the respondent had previously had an I-130 denied, which was filed by the same spouse, February 7th 2003, and it was denied because the respondent failed to provide the required documentation. The respondent through counsel, another attorney, I believe, filed a motion to reopen, and with that, filed some documentation. However, the Government denied the motion to reopen and indicated that the documentation received still didn't satisfy or provide the documentation that they requested. The court is not able to grant a continuance at this time for the adjudication of the I-130 marked as Exhibit Number 2. The document indicates that it usually takes 990 days to 999 days from the date of the receipt of the application to process this kind of case, and the Court simply could not – is not able to provide a continuance for that length of time or any amount of time that would be close to that. Thus, the Court will enter the following order:

IT IS ORDERED that the respondent's request for a continuance be denied for the reasons set forth above;

IT IS FURTHER ORDERED that the respondent's request for voluntary departure in the alternative be granted as a matter of law and discretion upon the payment of a five hundred dollar voluntary departure bond by the respondent. Should the respondent fail to depart on or before the voluntary departure date, then the voluntary departure order will become an order of removal, and the respondent will be removed to his native country of Nigeria.

CLAREASE RANKIN-YATES
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before CLAREASE RANKIN-YATES in the matter of:

SAMSON TAIWO DADA

A 78 129 270

Houston, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Alesia M. Brown
Alesia M. Brown
(Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

6/26/05
(Completion Date)